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# Lex Scripta Journal

## **From Confinement to Constitutional Freedom: Understanding Bail in India**

Author

Khushi Vashistha



# From Confinement to Constitutional Freedom: Understanding Bail in India

**Khushi Vashistha**

*Advocate*

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## Introduction

The principle of liberty forms the cornerstone of any democratic society. In India, access to justice is a bedrock of rule of law along with the Constitution, that guarantees fundamental rights, including the right to personal liberty under Article 21, which states that "*No person shall be deprived of his life or personal liberty except according to the procedure established by law.*" However, this right frequently eludes Indian undertrial detainees. The constitution of any criminal act includes two components- *Mens Rea* i.e. the guilty mind and *Actus Reas* i.e. the guilty act, which is interlinked with punishment, a retrospective effect against any criminal act done. Human rights became a prominent factor in penological jurisprudence after the Second World War<sup>1</sup>. The notion of crime has developed over time along with the changing methods of punishing offenders which drastically rose the population of the undertrial prisoners in the prisons across the country, for instance, allowing specified offenders to obtain bail during the pre-trial or undertrial phase. The concept of bail fulfills twin objectives. Former one is decongestion of prisons and latter one is criminal suspects or alleged offenders must only be kept in prison, if it is necessary<sup>2</sup>. For several years, the Indian criminal justice system has overlooked over 200,000 prisoners in detention, with many undertrial prisoners serving sentences equivalent to the maximum punishment for the alleged offenses. This large number of undertrials presents a contradiction in a legal system that operates on the fundamental principle that a person is presumed innocent until proven guilty. It was observed by the Supreme Court that the prisoners were not kept behind the bars for extended period because they were guilty, but because they could not afford bail and the court had no time to recognize them. Though the concept of bail existed even before our constitution was formulated but there was a need for reformation for betterment of the undertrial prisoners. As held in *Uday Mohanlal Acharya vs. State of Maharashtra*, pre-trial detainees are to be released on bail under *Section 167 of the Code of Criminal Procedure, 1973 (CrPC)*, if their judicial custody exceeds 90% (60 days) of the indictment and no charge sheet filed by police.<sup>3</sup>

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<sup>1</sup> Singh SD. Law of Probation in India with special reference to Uttar Pradesh. *The Indian Journal of Social Work*, 1959;20(1):13.

<sup>2</sup> Goswami A, Gautam R. Bars, Bureaucracy and Beyond: Understanding The Dynamic of Indian Prison Administration. *Integrity Education*, 2024:111.

<sup>3</sup> Akib K. The human right of under trial prisoners. *Legal Service India*, 2021:1:1–1.

## Bail: Ensuring the Right to Access Justice

The jurisprudence of bail in India is intrinsically connected to the larger constitutional provision of access to justice. Bail is more than just a procedural concession; it serves as a link between the presumed innocence and the practical reality of a criminal prosecution. It protects the right to a fair trial by granting an accused interim release until adjudication, preventing pre-trial confinement from devolving into retribution.

The primary objective of granting bail is to secure the presence of the accused before the court during the stages of investigation, inquiry, or trial within the prescribed timeframe. Bail, however, cannot be denied or withheld as a form of punishment in itself. Where the trial process is unduly prolonged, the prosecution cannot resist the grant of bail to an undertrial merely on the ground that the charges are grave or serious in nature. The decision to grant bail must instead be based on a rational assessment, particularly the likelihood of the accused absconding or attempting to evade the trial. An undertrial prisoner, in this context, refers to an individual who is facing trial and may be in detention, judicial custody, or remand, but whose guilt has not yet been conclusively determined.

The right to justice, as guaranteed by Articles 14, 21, and 39A of the Indian Constitution, requires that every citizen, regardless of economic or social standing, have an equal opportunity to defend oneself before the courts. However, the actual fact suggests contrary. A majority of undertrial prisoners languish in jails not because of the gravity of their alleged offence, but because they are too poor to furnish sureties or access competent legal representation.<sup>4</sup> This contradiction reveals a systemic disparity between the legal promise of access to justice and its practical implementation.

The Supreme Court, in *Hussainara Khatoon v. State of Bihar*, directly addressed this imbalance by declaring that free legal aid and a speedy trial are essential components of “reasonable, fair and just” procedure under Article 21.<sup>5</sup> The Court emphasised that without such safeguards, bail as a tool of justice would be limited to a benefit reserved for the wealthy, effectively excluding the marginalised from meaningful access to justice.

Subsequent judicial pronouncements have reaffirmed that “bail is the rule and jail is the exception.” In *Manish Sisodia v. Directorate of Enforcement* and *Bikramjit Singh v. State of Punjab*, the Court underscored that prolonged pre-trial incarceration transforms the legal process into punishment itself, violating the principle of innocence until proven guilty.<sup>6</sup> Similarly, the insistence on onerous surety conditions has been criticized as indirectly denying bail, with courts increasingly recognizing personal bonds and flexible conditions as legitimate alternatives.<sup>7</sup>

Despite these positive verdicts, systemic difficulties remain. Overcrowded prisons, limited access to legal aid clinics, and judicial delays remain obstacles to the bail system's potential to function as a meaningful enabler of justice. Many undertrials are uninformed of their right to seek for statutory bail under Section 167(2) CrPC, and they are unable to manage procedural complexity without guidance. The failure of institutions designed to operationalise bail undermines its promise as a guarantor of liberty.

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<sup>4</sup> Nishi Karol, *Access to Justice for Undertrial Prisoners in India*, (2025) 11 Int'l J. L. 23, 24–25

<sup>5</sup> *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1369

<sup>6</sup> *Manish Kumar Sisodia v. Directorate of Enforcement*, 2024 SCC OnLine Del 3731; *Bikramjit Singh v. State of Punjab*, (2020) 10 SCC 616

<sup>7</sup> *Moti Ram v. State of M.P.*, (1978) 4 SCC 47; see also Dr. Kusum Chauhan & Sahil Verma, *Bail Jurisprudence & Under-Trial Prisoners: Issues & Challenges*, (2025) 11 Int'l J. L. 18, 20–21

## Judicial Approach and Observations in the *Hussainara Khatoon* Case

The landmark judgment of *Hussainara Khatoon v. State of Bihar* (1979) marked a watershed moment in the recognition of fundamental rights for the marginalized sections of society. It is historically significant as it ushered in the era of Public Interest Litigation (PIL) in India. A PIL, in its essence, is a judicial proceeding initiated not by the aggrieved individuals themselves but by a concerned citizen or group, seeking to enforce the rights of those unable to access justice due to poverty, illiteracy, or social disadvantage.<sup>8</sup> Such cases provide a vital mechanism for redress when victims are financially or socially incapacitated from approaching the courts directly.

This development also reflected the philosophy of judicial activism, which rests on the belief that courts are not merely interpreters of codified law but are also custodians of justice in its substantive sense. Judicial activism thus allows the judiciary to adopt a purposive interpretation of the law to protect constitutional rights.<sup>9</sup> By entertaining PILs, Indian courts expanded their scope of intervention to ensure that systemic injustices could be addressed collectively rather than individually.

The *Hussainara Khatoon* case exemplified this approach. It brought national attention to the deplorable conditions of thousands of undertrial prisoners languishing in Bihar's prisons for years without trial, many of whom had already spent periods longer than the maximum sentence prescribed for their alleged offences.<sup>10</sup> The Supreme Court, while addressing these petitions, emphasized that the right to a speedy trial and the availability of bail are integral to Article 21 of the Constitution.<sup>11</sup> In doing so, the Court recognized bail not merely as a procedural safeguard but as an essential aspect of access to justice and personal liberty.

## Genesis of the Case

The inception of the *Hussainara Khatoon* case can be traced to Advocate Pushpa Kapila Hingorani, who, upon reading a newspaper report, discovered the appalling plight of numerous women and children confined in Bihar's prisons. Many of them continued to be incarcerated even after completing their sentences, while others remained behind bars for years without a trial. Disturbingly, several individuals charged with petty offences—ordinarily warranting only a few months of imprisonment—had been languishing in jail for as long as five to ten years due to the repeated adjournment of their hearings.<sup>12</sup>

Moved by these revelations, Hingorani approached the Supreme Court of India by filing a writ of *Habeas Corpus* on behalf of Hussainara Khatoon and the other prisoners named in the news article. The petition was filed under Article 32 of the Constitution, which empowers the Court to enforce fundamental rights.<sup>13</sup> Initially, the plea was questioned for its validity since it was based solely on a newspaper report and lacked direct representation from the prisoners. However, in 1979, Bihar admitted the existence of such cases and agreed to release the prisoners mentioned, including those detained under the Foreigners Act, 1946, thereby giving formal recognition to the petition.

The primary legal issues that arose in this case revolved around the prolonged and unlawful detention of prisoners who had already served sentences longer than what was prescribed for their offences. Another crucial issue concerned the recognition of the **right to a speedy and fair trial** as an integral part of **Article 21** of the Indian Constitution, which guarantees the right

<sup>8</sup> S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, Oxford University Press, 2002, p. 19

<sup>9</sup> Upendra Baxi, *The Indian Supreme Court and Politics*, Eastern Book Company, 1980, p. 75.

<sup>10</sup> *Hussainara Khatoon (I) v. State of Bihar*, AIR 1979 SC 1360.

<sup>11</sup> Ibid.

<sup>12</sup> *Hussainara Khatoon (I) v. State of Bihar*, AIR 1979 SC 1360

<sup>13</sup> Constitution of India, Article 3

to life and personal liberty. Additionally, the case raised an important question regarding the **State's responsibility to provide free legal aid** to individuals belonging to the socially and economically disadvantaged sections of society, ensuring that justice is not denied on account of poverty or lack of resources.

### **Judicial Verdict**

The decision in the *Hussainara Khatoon* case was delivered by Justice P.N. Bhagwati and Justice D.A. Desai. The Court directed the immediate release of the undertrial prisoners identified in the *Indian Express* report, declaring their prolonged incarceration unlawful and a direct violation of Article 21 of the Constitution, which guarantees the right to life and personal liberty, along with the freedom of movement. The State of Bihar was further instructed to prepare a comprehensive list of all pending criminal cases and place it before the Court for scrutiny.

Drawing on the precedent set in *Maneka Gandhi v. Union of India*, the Court reiterated that the right to a fair and speedy trial forms an inseparable part of Article 21.<sup>14</sup> It condemned the systemic discrimination faced by economically weaker prisoners and held that denying them access to justice amounted to a constitutional violation. In its ratio decidendi, the Court also emphasized the necessity of providing free legal aid to indigent and illiterate prisoners so that they, too, could exercise their fundamental rights to a fair trial.<sup>15</sup>

Additionally, the Court criticized the inefficiency of the judicial system, attributing the plight of undertrial prisoners to procedural delays and poor case management. To address this, it mandated stricter oversight of trial timelines by directing that whenever a case remained pending for more than six months, an explanation for the delay must be furnished during the hearing. This judgment not only safeguarded the rights of undertrials but also sought to reform the judicial process to prevent the recurrence of such injustices.

### **Access to Justice through a Constitutional Context**

India's criminal justice system traces its roots to colonial-era legislation, which continues to exhibit a bias against the weaker and marginalized sections of society. The law, while intended to safeguard rights, often ends up serving the interests of the privileged and overlooking those of the underprivileged. This inherent imbalance allows affluent individuals to evade legal consequences, while prisons remain largely occupied by the poor. The complex hierarchy of courts and the costly appellate process further prevent economically disadvantaged individuals from seeking justice. In essence, when access to justice comes at a prohibitive cost, it amounts to its indirect denial. Such conditions contradict the Supreme Court's ruling that providing legal aid to the vulnerable is a constitutional obligation of the State — one that arises not only under *Article 39-A* but also from the guarantees enshrined in *Articles 14, 19, and 21* of the Indian Constitution.

Iyer J. carefully laid down that the guarantee of human dignity forms part of a constitutional culture under Articles 14, 19 and 21. "... *Dehumanise him and to violate his very personhood, using the mask of dangerousness and security... There cannot be a quasi-caste system among prisoners in the egalitarian context of Article 14*". The decision laid to rest the discrimination between the 'better-class undertrial' with not so well-off by adjudicating that both be treated equally.

The judicial framework, therefore, is guided by three key principles: first, it must prioritize the promotion of justice; second, access to justice must extend equally to the poor, with the state

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<sup>14</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

<sup>15</sup> S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, Oxford University Press, 2002, p. 25

bearing the responsibility of offering legal assistance to those who cannot afford it; and third, the idea of justice must be holistic, encompassing social, economic, and political dimensions.

### **Bail under Article 39A**

India, as a society with diverse economic strata, bears a significant social responsibility — one of its foremost obligations being the provision of free legal aid services. Free legal aid—which encompasses legal advice, education, and representation—guarantees equal access to justice for all individuals, irrespective of their economic constraints, social disadvantages, or other limiting conditions. Therefore, the state bears the obligation to ensure that the legal system functions in a manner that upholds and promotes justice equally for all.

Lok Adalats have emerged as an important legal mechanism and an effective means for the swift and uncomplicated resolution of disputes. Functioning across both rural and urban areas, they ensure the delivery of speedy and affordable justice while addressing the needs of the weaker sections of society. The enactment of the Legal Services Authorities Act, 1987, reinforced the constitutional obligation set forth under Article 39-A of Indian Constitution by ensuring that individuals in custody are entitled to receive legal aid through the National Legal Services Authority (NALSA) and its respective State and District Legal Services Authorities.<sup>16</sup> This framework enables prisoners to access legal assistance not only during the pre-litigation phase but also at every stage of the appellate process.

### **Bail and the Protection of Personal Liberty under Article 21**

The right to a speedy trial, rooted in Article 21 of the Constitution, forms an essential component of the guarantee of life and personal liberty. In cases where this fundamental right is infringed, an individual has the constitutional remedy of approaching the Supreme Court under *Article 32* or the High Court under *Article 226* of Indian Constitution. In *P. Ramachandra Rao v. State of Karnataka*, the Supreme Court laid down certain guiding principles, emphasizing that criminal courts must effectively utilize the powers conferred under *Sections 309, 311, and 258* of the Code of Criminal Procedure to uphold and implement the right to a prompt trial.

In *Kartar Singh v. State of Punjab*, the Supreme Court affirmed that the right to a speedy trial forms an integral part of Article 21 of the Constitution. This right takes effect from the moment of arrest and detention of the accused and extends through the stages of investigation, inquiry, trial, appeal, and revision, ensuring that no prejudice arises from unwarranted or prolonged delay in the judicial process.<sup>17</sup>

### **Challenges and Injustices Encountered by Undertrial Prisoners**

Undertrials are the most ill-fated human population behind the bars. Primarily one needs to note that most of these undertrials are socially and economically vulnerable, who are arrested for some minor offenses. Due to their inability to hire a lawyer or to pay bail bonds, their hope of release eventually dies down in that cell. This is the reason, Justice Bhagwati in one of the judgements calls them “lost souls”<sup>18</sup>

- Limited Availability of Legal Services**

Without the provision of free legal aid to the most economically disadvantaged sections of society, the notion of universal access to justice remains unattainable. Article 39-A, introduced through the 42nd Constitutional Amendment, serves as the cornerstone of the legal aid

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<sup>16</sup> The Legal Services Authorities Act, 1987, § 12.

<sup>17</sup> *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569

<sup>18</sup> *Hussainara Khatoon & Ors. Vs. Home Secretary, State of Bihar* (AIR 1979 SC 1360)

framework in India. It obligates the state to uphold justice based on the principle of equal opportunity and to provide free legal assistance so that no citizen is denied justice due to economic hardship or other limitations.

In practice, however, numerous indigent prisoners across the country remain without legal representation. Many are unaware of the status of their cases or even of their constitutional right to free legal aid. Often, when informed that they are entitled to state-sponsored legal assistance, they respond with confusion and disbelief—highlighting the persistent gap between constitutional promise and ground reality.

- **Inhumane Prison Environment**

Overcrowding in Karnataka's prisons has led to grave issues such as unhygienic conditions, inadequate sanitation, and poor living standards. Many jails accommodate nearly double their sanctioned capacity, violating the Model Prison Manual's requirement of one toilet per seven inmates. In reality, some facilities provide only two toilets for sixty prisoners at night. The scarcity of clean drinking water further worsens sanitation, and prisoners often go without bathing for weeks. Cells remain poorly ventilated, with little access to sunlight or fresh air, causing foul odours and unhealthy surroundings. Insufficient staff results in prolonged lock-up hours, aggravating the inmates' mental and physical distress. Such conditions reflect a serious neglect of prisoners' basic human rights and dignity, violating the constitutional guarantee of humane treatment under Article 21 of the Indian Constitution.<sup>19</sup>

- **Prison Congestion**

Overcrowding in Indian prisons remains a long-standing and severe problem, closely linked to systemic flaws in the justice system. The primary cause is the excessive number of undertrial prisoners, largely resulting from delayed trials and a poor judge-to-population ratio. This congestion severely undermines efforts to ensure humane prison conditions and overburdens already inadequate infrastructure. It also leads to poor sanitation, disease outbreaks, and increased indiscipline among inmates. Moreover, prison staff are often diverted to routine tasks like food distribution and security, neglecting rehabilitation efforts. Despite India's comparatively low imprisonment rate globally, nearly 69% of its prisoners are undertrials, highlighting the gravity of the issue.<sup>20</sup>

## **Conclusion**

The *Hussainara Khatoon v. State of Bihar* case marked a pivotal moment in addressing one of the most critical shortcomings of India's judicial system. The judgment reinforced that the protection of law extends equally to prisoners and convicts, affirming that a breach of fundamental rights remains a violation irrespective of the individual affected—particularly when such denial stems from arbitrary or unjust reasons. The case exposed the inefficiency and inequity prevailing within the Indian prison system. The Court's ruling not only ensured the immediate release of unlawfully detained individuals but also established vital directives for the administration of prisons and the protection of inmates' rights. Furthermore, the concept of bail must be implemented in a way that upholds the core tenet of jurisprudence — the presumption of innocence until proven guilty. To ensure a fair bail framework, it is essential to strengthen the subordinate judiciary, as it primarily handles the majority of bail applications. Through judicial activism and the protection of fundamental rights, the judiciary has significantly broadened and humanized the interpretation of bail. This evolving judicial outlook aligns with the principles of human rights jurisprudence in the 21st century.

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<sup>19</sup> Based on reports on prison conditions and overcrowding in Karnataka as observed under the Model Prison Manual, 2016.

<sup>20</sup> Data based on National Crime Records Bureau (NCRB) Prison Statistics, 2023

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